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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO ROLANDO CABELLO,

Defendant and Appellant.

D069958

(Super. Ct. No. SCS274556)

APPEAL from a postjudgment order of the Superior Court of San Diego County,
David J. Daniels, Judge. Affirmed.

Theresa O. Stevenson, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Sabrina Y.
Land-Erwin, for Plaintiff and Respondent.

I

INTRODUCTION

Francisco Rolando Cabello appeals from a postjudgment order denying his petition for resentencing under Penal Code section 1170.18,¹ enacted by the voters as part of the Safe Neighborhoods and Schools Act (Proposition 47). (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 14, pp. 73–74). He contends the court erred in finding that section 490.2, subdivision (a) (§ 490.2(a)), also enacted by the voters as part of Proposition 47 (Voter Information Guide, Gen. Elec., *supra*, text of Prop. 47, § 8, p. 72), does not require the reduction of his felony conviction for violating Vehicle Code section 10851, subdivision (a) (Veh. Code, § 10851(a)) to a misdemeanor. We conclude section 490.2(a) does not apply to convictions under Vehicle Code section 10851(a) and affirm the order.²

II

BACKGROUND

Cabello pleaded guilty to unlawfully taking and driving a vehicle under Vehicle Code section 10851(a). As the factual basis for his guilty plea, Cabello admitted he "unlawfully took a vehicle, the personal property of another, with the intent to temporarily or permanently deprive the owner of its use." The court sentenced him to a negotiated term of two years in jail.

¹ Further statutory references are to the Penal Code unless otherwise stated.

² This issue is currently pending before the California Supreme Court. (*People v. Page* (2015) 241 Cal.App.4th 714, review granted Jan. 27, 2016, S230793.)

A little over a year later, Cabello petitioned the court under section 1170.18 to have his conviction reduced to a misdemeanor under section 490.2(a). The court denied the petition, finding Cabello's crime was not eligible for the requested reduction.

III

DISCUSSION

We review the interpretation and constitutionality of a statute de novo. (*In re J.L.* (2015) 242 Cal.App.4th 1108, 1114; *People v. Health Laboratories of North America, Inc.* (2001) 87 Cal.App.4th 442, 445.)

Section 1170.18, subdivision (a), permits a person currently serving a sentence for a felony conviction, which would have been a misdemeanor under one of the code sections amended or added by Proposition 47, to petition for resentencing according to the amended or added code section.³ As Proposition 47 did not amend Vehicle Code section 10851(a), Cabello may only petition for resentencing if his conviction for violating this code section would have been a misdemeanor under one of the code sections added by Proposition 47.

Section 490.2 is among the code sections added by Proposition 47. (Prop. 47, § 8.) With exceptions not relevant here, section 490.2(a) provides: "*Notwithstanding*

³ Section 1170.18, subdivision (a), provides: "A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ("this act") had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act."

Section 487 [defining some conduct constituting grand theft] or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars (\$950) shall be considered petty theft and shall be punished as a misdemeanor."⁴ (Italics added.)

Cabello contends section 490.2(a) requires the reduction of his conviction to a misdemeanor because he interprets section 490.2(a) to apply to any theft of any property valued at \$950 or less.⁵ However, this interpretation ignores the statute's opening clause, "[n]otwithstanding Section 487 or any other provision of law defining grand theft," which limits the application of section 490.2(a) to statutes defining grand theft. Vehicle Code section 10851(a) is not a statute intended to define grand theft. Rather, "[Vehicle Code] section 10851(a) 'proscribes a wide range of conduct.' [Citation.] A person can violate [Vehicle Code] section 10851(a) 'either by taking a vehicle with the intent to steal it or by driving it with the intent only to temporarily deprive its owner of possession (i.e.,

⁴ Section 490.2(a) provides in full: "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars (\$950) shall be considered petty theft and shall be punished as a misdemeanor, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290."

⁵ According to the police report, the vehicle Cabello took was a 1995 four-door Honda Civic with faded paint all over the body and an odometer reading of 203,770 miles. As part of the proceedings below, both parties produced evidence of the vehicle's value. The court found Cabello had presented enough evidence to establish the vehicle's value was less than \$950.

joyriding).' " (*People v. Garza* (2005) 35 Cal.4th 866, 876.) Thus, section 490.2(a) does not apply to Vehicle Code section 10851(a).

The legislative history of Proposition 47 does not compel a different conclusion. In explaining Proposition 47's penalty reduction provisions, the Legislative Analyst's analysis stated Proposition 47 reduced "certain nonserious and nonviolent property and drug offenses from wobblers or felonies to misdemeanors." (Voter Information Guide, Gen. Elec., *supra*, analysis of Prop. 47 by Legis. Analyst, p. 35.) The analysis then specifically identified the affected crimes as: grand theft, shoplifting, receiving stolen property, writing bad checks, check forgery, and drug possession. (*Ibid.*) The analysis did not identify unlawful taking or driving a vehicle as an affected crime. (*People v. Saucedo* (2016) 3 Cal.App.5th 635, 751, review granted Nov. 30, 2016, S237975; *People v. Johnston* (2016) 247 Cal.App.4th 252, 258, review granted July 13, 2016, S235041.)

With regard to grand theft, the analysis further explained: "Under current law, theft of property worth \$950 or less is often charged as petty theft, which is a misdemeanor or an infraction. However, such crimes can sometimes be charged as grand theft, which is generally a wobbler. For example, a wobbler charge can occur if the crime involves the theft of certain property (*such as cars*) or if the offender has previously committed certain theft-related crimes. This measure would limit when theft of property of \$950 or less can be charged as grand theft. Specifically, such crimes would no longer be charged as grand theft solely because of the type of property involved or because the defendant had previously committed certain theft-related crimes." (Voter

Information Guide, Gen. Elec., *supra*, analysis of Prop. 47 by Legis. Analyst, p. 35, italics added.)

Cabello relies on the parenthetical phrase "such as cars" to assert the voters intended Proposition 47 to apply to vehicle theft under Vehicle Code section 10851(a). However, this phrase appears in a discussion of grand theft and more logically refers to a violation of section 487, subdivision (d)(1) (§ 487(d)(1)), which is commonly referred to as grand theft auto and to which Proposition 47 indisputably applies.

Nevertheless, Cabello asserts the voters must have intended for section 490.2(a) to apply to both Vehicle Code section 10851(a) and section 487(d)(1) because a violation of Vehicle Code section 10851(a) is a lesser included offense of a violation of section 487(d)(1). (*People v. Kehoe* (1949) 33 Cal.2d 711, 716; *People v. Buss* (1980) 102 Cal.App.3d 781, 784). In his view, a contrary interpretation would be anomalous and would violate the equal protection clauses of the federal and state constitutions by potentially subjecting a person to a felony under Vehicle Code section 10851(a) for the same conduct that would be a misdemeanor under section 487(d)(1).

The California Supreme Court has previously rejected this argument in closely analogous circumstances explaining, "neither the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor's discretion in charging under one such statute and not the other, violates equal protection principles." (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838.) Thus, a defendant may not complain about being charged with a felony violation under one statute even though there is an identical statute prescribing a lesser punishment. (*Ibid.*; accord, *People v.*

Romo (1975) 14 Cal.3d 189, 197 [a car thief may not complain of being subjected to disparate punishments for conduct which violates both § 487(d)(1) and Veh. Code § 10851(a)].) "[N]umerous factors properly may enter into a prosecutor's decision to charge under one statute and not another, such as a defendant's background and the severity of the crime, and so long as there is no showing that a defendant 'has been singled out deliberately for prosecution on the basis of some invidious criterion,' that is, 'one that is arbitrary and thus unjustified because it bears no rational relationship to legitimate law enforcement interests[,]' 'the defendant cannot make out an equal protection violation." (*People v. Wilkinson, supra*, at pp. 838–839; accord, *People v. Saucedo, supra*, 3 Cal.App.5th at pp. 652–653; *People v. Johnston, supra*, 247 Cal.App.4th at pp. 258–259.)

IV

DISPOSITION

The postjudgment order is affirmed.

McCONNELL, P. J.

WE CONCUR:

NARES, J.

O'ROURKE, J.